A

M SARASWATHI DEVI K GOVIND

v.

KEITH IAN MONTEIRO

B

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[DIVORCE PETITION NO: 33-7-1999]
11 NOVEMBER 2005

C ***FAMILY LAW:*** *Children - Custody - Variation - Application by husband to vary order giving custody of child to wife - Principles and considerations - Whether there was a material change in circumstances - Welfare of child - Wishes of child - Importance of judge's interview - Law Reform (Marriage and Divorce) Act 1976, ss. 96, 88(2)*

D This was an application by the petitioner/husband for a variation of the order (contained in the *decree nisi*) granting custody of the two children of the marriage to the petitioner/wife. The older child has now attained the age of 18. The petitioner/husband now sought custody of the younger child ('the child').

E

The parties were married in 1986 and a *decree nisi* (consent) was recorded in 1999. The petitioner/husband converted to Islam in 2000 and remarried in the same year. The petitioner/wife remarried a Dutch national in 2002 and they both presently reside

F in Bintulu (Sarawak) with the child who attends secondary school thereat.

In the course of the proceedings, the child, now 14 years' old, was interviewed by the learned judge and the following pertinent

G facts were ascertained: (i) he has been staying in Port Dickson since his birth; (ii) he is not happy staying in Bintulu; (iii) he would prefer to stay in his hometown of Port Dickson with his father; (iv) he likes the company and familiarity of his friends and former classmates at the Port Dickson High School; (v) staying in

H Port Dickson would make it easier for him to meet up with his brother who attends university in Kuala Lumpur; (vi) most of his cousins and relatives stay in or around Kuala Lumpur; (vii) Bintulu is a strange, unfamiliar place where he has no friends; and (viii) he feels out of place in Bintulu where he is constantly gawked at

I because of his uncommon, mixed parentage.

Following the interview, and upon the application of counsel for the petitioner/husband, the learned judge made an interim order giving custody of the child to the petitioner/husband pending the determination of the present application on its merits.

Held (allowing the petitioner/husband's present application for custody):

[1] Section 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') clearly empowers the court to vary an order for the custody of a child where there has been a 'material change in the circumstances'. (p 307 F - G)

[1a] The aforesaid events that took place after the *decree nisi* certainly constituted a 'material change in the circumstances' as contemplated by s. 96 of the LRA. (p 308 C - D)

[2] A distinction must be made as between applications for custody and those for access as different considerations will apply. (p 309 C - D)

[3] In matters concerning custody, s. 88(2) of the LRA makes it mandatory for the court to regard the welfare of the child as the 'paramount consideration' and, subject to that, the wishes of the parents as well as those of the child. (pp 309 F - H & 312 G)

[4] In considering the welfare of the child, it is valuable for the judge hearing the custody application to interview the child. (pp 312 H & 313 A - B)

[5] Considering all the peculiar facts and circumstances of the present case, and taking into account the welfare of the child as well as his wishes under s. 88(2)(b) of the LRA, custody should be given to the petitioner/husband. (p 313 C)

[Custody to petitioner/husband with reasonable access to petitioner/wife.]

Case(s) referred to:
Chan Bee Yen v. Yap Chee Kong [1989] 1 MLJ 370 ***(refd)***
Foo Kok Soon v Leony Rosalina [1998] MLJU HC 61 ***(dist)***
Gomez v. Gomez [1969] 1 MLJ 228 ***(refd)***
K Shanta Kumari v. Vijayan [1986] 2 MLJ 216 ***(refd)***
Khoo Cheng Nee v. Lubin Chiew Pau Sing [1996] 4 MLJ 171 ***(refd)***
Lim Fang Keng v. Toh Kim Choo [1995] 4 CLJ 733 HC ***(refd)***
Mahabir Prasad v. Mahabir Prasad [1981] CLJ 124; [1981] CLJ (Rep) 65 FC ***(refd)***

A *Manickam v. Intherahnee [1985] 1 MLJ 56* ***(refd)***
Phua Meng Lee lwn. Tey Bin Soon [1995] 2 CLJ 407 HC ***(dist)***
Re A & B (Minors) [1997] 2 MLJ 154 ***(foll)***
Re Ko (an infant) [1990] 1 MLJ 494 ***(refd)***
Teh Eng Kim v. Yew Peng Siong [1977] 1 MLJ ***(refd)***
B *Winnie Young v. William Lee Say Beng [1990] 1 MLJ 123* ***(foll)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 96, 88(2)(b)

For the petitioner/husband - Fatima Tahir Ali; M/s Fatima Tan & Cheah
C *For the petitioner/wife - Krishsna Dallumah; M/s Krishna Dallumah & Co*

Reported by Gan Peng Chiang

D

JUDGMENT

Low Hop Bing J:

Application

This application in encl. (28) was filed by the husband petitioner
E ("the father") for a variation of the custody order contained in the decree nisi granted by this court on 1 April 1999 wherein, *inter alia*, custody of the two children of the marriage had been granted to the wife petitioner ("the mother"). The variation sought is in relation of the younger child ("the child"), as the elder child has
F now attained 18 years of age.

Factual Background

The petitioners were married on 25 January 1986 and were blessed with two children.

G Pursuant to a divorce petition, a consent decree nisi was recorded on 1 April 1999 containing the aforesaid custody order.

In the year 2000, the father had embraced the religion of Islam and remarried the same year.

H In 2002, the mother tied the nuptical knot with a Dutch national. She had taken care of the child for the past two years. The mother and her present husband are now residing in Bintulu, Sarawak where the child has been registered with the national
I type secondary school there.

Pursuant to this application, parties' respective learned counsel had requested me to interview the child in order to determine the merits of the application.

On 29 July 2005, I conducted an interview with the child in the presence of my interpreter but in the absence of respective learned counsel. From the interview, by way of a casual and informal question and answer session lasting some 45 minutes, I find that the child is now 14 years old and has been staying in Port Dickson ever since he was born.

At the time of this application, he was staying in Bintulu, with the mother and her present husband ie, the child's step-father.

The child is aware of his parents' *decree nisi* containing the custody order and added that he was in court to determine his wishes to stay with his mother or his father. He was quite candid in saying that he was actually not happy staying with his mother and also with his step-father in Bintulu and that he wishes to stay in his hometown Port Dickson with the father, because it is more convenient to him (the child). In Port Dickson he has all his friends with whom he is more familiar as he has been studying in the Port Dickson High School. He was happy in that school, although he had honestly confessed that he did have a discipline problem by making noise in class. He feels more at home in Port Dickson than in Bintulu.

He added that his elder brother studies in the University of Nottingham Malaysia, Kuala Lumpur and that by living with his father in Port Dickson, he could meet up with his elder brother during weekends, which he would be unable to do if he stays in Bintulu. His cousins and other relatives are in Puchong Jaya and Bukit Kinrara in Selangor and so it is easier for him to contact them.

He stressed that he has no friends in Bintulu which is a strange place to him. The people in Bintulu like to stare at him as they have not seen a person like him before and could not understand his custom and culture. They talked ill of him. As recently as June 2005, he was punched by an Iban boy in Bintulu. He repeated his wishes to return to Port Dickson, possibly within one week.

A After the interview, on the application of the father's learned counsel, in the face of the objection by the mother's learned counsel, I made an interim order that the father be given interim custody of the child, pending my determination on the instant application.

B

Material Change In The Circumstances

Miss Fatima Tahir Ali, learned counsel for the father, relies on ss. 96 of the Law Reform (Marriage and Divorce) Act 1976, stressing that there has been material change in the circumstances.

C A reference hereinafter to a section is a reference to that section in the Law Reform (Marriage and Divorce) Act 1976, unless otherwise stated.

Mr. Krishna Dallumah, learned counsel for the mother, contended
D that there has been no material change in the circumstances to warrant a variation of the order for custody.

In my judgment, I shall refer to the relevant portion of s. 96 as follows:

E **96. Power for court to vary orders for custody or maintenance**

> The court may at any time and from time to time vary, … any order for the custody … of a child on the application of any interested person, … where there has been any material change
F in the circumstances.

The provisions of s. 96 clearly confer upon the court the power to eg, vary an order for custody of a child where eg, there has been a material change of circumstances: see *Gomez v. Gomez* [1969] 1 MLJ 228 per Raja Azlan Shah J (now HRH the Sultan
G of Perak); and *Mahabir Prasad v. Mahabir Prasad* [1981] CLJ 124; [1981] CLJ (Rep) 65 FC per Raja Azlan Shah Ag LP (now HRH the Sultan of Perak).

In this regard, the question that calls for determination is whether
H there had been a material change in the circumstances. The answer to this question must inevitably be based on the facts and circumstances of each particular case.

I

By way of illustration, in *Phua Meng Lee, supra*, when the wife was granted custody of a 13-year-old child of the marriage, the child had refused to return to the wife's house. The husband's application for a variation of the custody order under s. 96 on the ground that the child's refusal to stay with the wife was a material change in the circumstances. However, Suriyadi JC (now J) held that the child's refusal was not such a change as to be considered by the court.

In the instant application, on 1 April 1999 when the *decree nisi* containing the custody order was granted, the parties were apparently staying in Port Dickson or in any event in West Malaysia. However the turn of events since 1999 did bring about the acquisition of new marital and religious status of the father and the mother, in addition to the pristine South China Sea which widens the geographical gap between them, from Port Dickson in West Malaysia to Bintulu in East Malaysia and also the intercontinental expanse of Holland in Europe as the mother is now the wife of a Dutch national. These changes in the circumstances are in my view certainly material to the child as an adherence to the original custody order would necessarily involve his placement in Bintulu and probably in Holland.

Welfare Of The Child

It was submitted for the father that paramount consideration be given to the welfare of the child having regard to his wishes, citing, *inter alia:*

1. *Lim Fang Keng v. Toh Kim Choo* [1995] 4 CLJ 733 HC;
2. *Re A & B (Minors)* [1997] 2 MLJ 154 HC;
3. *Khoo Cheng Nee v. Lubin Chiew Pau Sing* [1996] 4 MLJ 171 HC; and
4. *Winnie Young v. William Lee Say Beng* [1990] 1 MLJ 123 HC.

It was also submitted for the mother that the paramount consideration must be the welfare of the child but the mother added that there should be no variation relying on:

A 1. *Chan Bee Yen v. Yap Chee Kong* [1989] 1 MLJ 370 HC;

2. *Manickam v Intherahnee* [1985] 1 MLJ 56 FC;

3. *Phua Meng Lee lwn. Tey Bin Soon* [1995] 2 CLJ 407 HC;

B 4. *Re Ko (an infant)* [1990] 1 MLJ 494 HC;

5. *Teh Eng Kim v. Yew Peng Siong* [1977] 1 MLJ 234 FC; and

6. *Foo Kok Soon v. Leony Rosalina* [1998] MLJU HC 61

C I shall first consider *Foo Kok Soon, supra,* in which the issue concerns access rather than custody. The relevant application in *Foo Kok Soon, supra,* filed by the wife seeks to vary a consent order so as to enable her to have unsupervised access to the children, as opposed to custody. Kamalanathan Ratnam J (as he D then was) made it clear in his judgment that a distinction must be made between custody and access. As the application before me concerns a variation of a custody order, I am of the view that different considerations would apply. Hence, this authority cited for the wife does not lend any support to her contention.

E

I must now consider the legal implications of s. 88(2) which merits reproduction as follows:

88. Power for court to make order for custody.

F (1) …

(2) In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:

G (a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he … is of an age to express an independent opinion.

Section 88(2) makes it mandatory for the court to consider the H welfare of the child as being paramount, and subject thereto, the wishes of the parents and of the child. This principle has been consistently applied by our courts, as have been demonstrated by the judicial pronouncements in all the aforesaid cases cited for the husband and the wife respectively.

I

For purposes of completeness, I would embark on an analysis of the authorities relied upon by the respective learned counsel in order to ascertain the relevant principles which govern the determination of this type of application before me.

In *Chan Bee Yen, supra*, the wife had earlier obtained an *ex parte* order granting her custody of her son aged seven years old. The husband applied to set aside the *ex parte* order. In granting *inter partes* custody order to the wife, Peh Swee Chin J (later FCJ) applied the following principles:

1. The paramount consideration is the welfare of the child, but this is not the sole consideration though it is predominant, and subject to this, the wishes of the unimpeachable parent prevail over those of the other, following *Manickam, supra;*

2. The age of the child (seven years old) comes within the rebuttable presumption under s. 88(3) in that it is good for the child to be with his mother; and

3. The mother did love the child more than the father did, and the child has now represented the only meaningful thing in life to her.

In *Manickam, supra,* the wife had left the matrimonial home and had taken the younger child aged four years to live with her in Muar. The elder child aged eight years remained with the husband in Johor Bahru. The husband had taken a second wife with whom he had a child. Custody of the two children of the first marriage was given to the wife. The husband's appeal was dismissed by the Federal Court, through the judgment of Wan Suleiman FJ, who applied s. 88(2)(b) and affirmed:

1. the welfare of the children as the paramount consideration;

2. the elder child aged eight years old could not reasonably be expected to express any independent opinion on his preferences;

3. the wishes of the unimpeachable parent prevail over those of the other; and

4. the care and attention of the natural mother can reasonably be expected to be superior to that of a step-mother, particularly one who has a child of her own and with every prospect of additions to the family.

Next, the husband and wife in *Re Ko, supra*, were blessed with a child. The child stayed with the husband in Penang, while the wife stayed in Kuala Lumpur. Relations between the husband and wife deteriorated and the wife applied for custody of the child aged seven years and three months. *Viva voce* evidence was adduced at the trial and the child was interviewed by the learned judge in chambers. The child was found to have expressed an equal liking to be with both his parents. In granting custody to the mother, Edgar Joseph Jr J (later FCJ) held, *inter alia*, that:

1. the welfare of the child should be the paramount consideration; and

2. the child's own views would be relevant to his own welfare.

Teh Eng Kim, supra, concerns a wife's application for the custody of three children aged 15 years, 10 years and five years respectively in order to take them to Australia as the wife wanted to remarry an Australian. The husband had since remarried. The children were interviewed by the learned judge. The two elder children had expressed no affection for the step-mother and wanted to stay with their natural mother in Australia. Arulanandom J (as he then was) granted the custody order in terms of the application, holding that:

1. the paramount consideration is the welfare of the child; and

2. no parent has a prior right.

The above decision was affirmed by the Federal Court through the judgment of Raja Azlan Shah FJ (now HRH the Sultan of Perak).

In *Lim Fang Keng, supra,* the marriage of the parties had ended up in divorce. By a deed of settlement, the plaintiff was to have custody of two children of the marriage. Their ages were eleven years and nine years respectively. The wife subsequently withdrew her consent in the deed of settlement to confer custody on the husband. Instead, she filed a custody suit. Before the hearing, the wife embraced the religion of Islam while the husband remained a Buddhist. The children preferred to be with their mother instead of their father. In granting custody to the wife, Suriyadi J applied, *inter alia*, the following principles:

1. the paramount consideration is the welfare of the children; and

2. children of tender age are not to be deprived of the love, care and devotion of their natural mother (see also *Re Ko, supra;* and *K. Shanta Kumari v. Vijayan* [1986] 2 MLJ 216 per Wan Yahya J (later SCJ).

The facts in *Re A and B (Minors), supra*, show that interim custody of the children of the marriage was given to the wife. The age of the children was 12 and nine respectively. They were usually in the care of paid foster parents or left on their own without supervision and were deprived of the warmth and stable environment of the family life. The children were more at ease and preferred to be with their father than with their mother. KC Vohrah J (later JCA) allowed the husband's application for a variation of the custody order in favour of the husband, applying, *inter alia*, the welfare of the children as the paramount consideration.

Where the wishes of the parents as to custody are in opposition to one another, the welfare of the child is the paramount, although not the sole, consideration: per Abdul Wahab Patail JC (now J) in *Khoo Cheng Nee, supra*. There, the wife through a divorce petition applied for custody of the children of the marriage. Her application for custody was contested by the husband. The children had been with their mother for the better part of the children's lives. The learned judge granted custody to the mother.

Although the above authorities cited for the parties do provide guidelines in relation to similar applications which involve the interpretation of the considerations contained in s. 88(2), the court in hearing and determining such an application must in the ultimate analysis examine and evaluate the facts and circumstances prevailing in each particular case in order to arrive at a just and fair decision. It is by no means easy to find two cases sharing identical facts and circumstances.

In determining the welfare of the child, the usefulness of a judge's interview with the child has been demonstrated in *Manickam, supra; Teh Kim Eng, supra;* and again in *Winnie Young, supra,* where the wife applied for custody of the child. In the interview, the child stated that he did not wish to follow his mother as he was

not used to her. Haidar J (later CJ(M)) dismissed the wife's application for custody, applying the welfare of the child as paramount consideration.

In the circumstances, my finding of facts as a result of my interview with the child as adumbrated above does play a vital role in interpreting the provisions of s. 88(2).

In the light of the facts and circumstances of this case, and after taking into account the welfare of the child as the paramount consideration, in line with a construction which is consistent with s. 88(2)(b), especially the wishes of the child of 14 years of age who has impressed me as having the intelligence and capacity of expressing an independent opinion, I am of the view that the custody order should be varied in favour of the father.

Conclusion

On the foregoing grounds, I order that custody of the child be given to the father with reasonable access to the mother, and such access is to be mutually agreed and arranged amicably by the parties herein so as to be consistent with their respective genuine concern for the welfare of the child.

I also make the consequential orders that the child's international passport now in the possession of the mother be surrendered by her to the father as the person presently having custody and that the father be wholly responsible for the maintenance of the child, in which event the original maintenance order is hereby rescinded.

The parties to bear their own costs respectively.